

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

ROGELIO “ROY” FERNANDEZ, )  
)  
Claimant, )  
)  
v. )  
)  
KEVIN BURGEMEISTER, )  
)  
Employer, )  
)  
and )  
)  
WESTERN COMMUNITY INSURANCE )  
COMPANY, )  
)  
Surety, )  
)  
Defendants. )  
\_\_\_\_\_ )

**IC 02-019760**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

Filed November 16, 2004

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted an emergency hearing<sup>1</sup> in Pocatello, Idaho, on April 16, 2004. Claimant was present and represented by Fred J. Lewis of Pocatello. Eric S. Bailey of Boise represented Employer/Surety. Mr. Larry Bollschweiler provided interpretation services. Oral and documentary evidence was presented and the parties took two post-hearing depositions. After the submission of post-hearing briefs, this matter came under advisement on October 15, 2004, and is now ready for decision.

**ISSUES**

By agreement of the parties, the issues to be decided as the result of the hearing are:

---

<sup>1</sup> At the time Claimant requested an emergency hearing, he was seeking benefits for an MRI and surgery for his left shoulder. Shortly before hearing, Claimant underwent left shoulder surgery so the emergent nature of the hearing is no longer present.

1. Whether Claimant injured his left shoulder in a work-related accident on December 13, 2002, and, if so;
2. Whether Claimant is entitled to medical benefits for treatment of his left shoulder;
3. Whether Claimant is entitled to temporary total disability (TTD) benefits; and,
4. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate.

### **CONTENTIONS OF THE PARTIES**

Claimant contends he not only injured his right shoulder in an industrial accident on December 13, 2002, but he also injured his left shoulder as well and should be compensated for medical and time-loss benefits. His delay in reporting the left shoulder injury is because he thought that injury would get better with time.

Defendants admit that Claimant injured his right shoulder in an industrial accident on December 13, 2002, and have accepted that claim. However, they deny that Claimant injured his left shoulder in that accident as it was approximately seven months later that Claimant first complained of left shoulder difficulties. Because Claimant failed to timely disclose a pre-existing right shoulder problem, in the event causation is found for the left shoulder, Defendants should receive a medical benefits credit of 50% for the right shoulder because they paid 100% and it has now been determined that the right shoulder condition should have been apportioned 50/50 for pre-existing conditions. Further, the left shoulder should also be apportioned 50/50 for pre-existing conditions. Therefore, if Defendants receive a 50% credit for the right shoulder and only owe 50% for the left, the end result is essentially a “wash.”

Claimant replies that even if the Commission finds that his left shoulder was not injured on December 13, Claimant injured his left shoulder while participating in physical therapy after his right shoulder surgery and is entitled to benefits under a “compensable consequence” theory.

Further, the issue of apportionment of benefits for Claimant's right shoulder is outside the limited scope of this emergency hearing and should not be considered. Moreover, Defendants have cited no authority for the proposition that medical benefits can be apportioned when an industrial accident has caused the need for surgery. Finally, Defendants should be required to pay two and one-half percent permanent physical impairment (PPI) for Claimant's left shoulder when he reaches medical stability.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. The testimony of Claimant and his wife, Maria, taken at the hearing;
2. Exhibits 1-14 and 17 admitted at the hearing; and,
3. The post-hearing deposition of Kenneth E. Newhouse, M.D., with two exhibits taken by Claimant on April 29, 2004, and that of Richard Wathne, M.D., with one exhibit taken by Defendants on May 6, 2004.

All objections made during the taking of the above depositions are overruled with the exception of Defendants' objection on page 21 of Dr. Wathne's deposition, which is sustained.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

### **FINDINGS OF FACT**

1. Claimant was 58 years of age at the time of the hearing. He was born in Mexico and immigrated to the United States when he was 10. He attended two years of school in Mexico and another three in the United States. Although an interpreter assisted at times at hearing, Claimant's ability to communicate in the English language is in dispute. He has worked as a farm laborer all his working life.

2. On December 13, 2002, Claimant was pulling a tarp over a load of wheat. He was standing on the rear tire of his truck when the rope he was pulling on to pull the tarp over the load somehow slipped and he fell to the ground. He landed on his right shoulder. He testified, “The pain went from my right to my left shoulder and it didn’t hurt very much; however, most of the pain was in my right shoulder.” Hearing Transcript, p. 25.

3. Claimant first sought medical attention post-accident on December 17, 2002, when he saw Mathew M. McKinlay, PA-C at Idaho Orthopedics and Sports Clinic. Claimant gave a history of his accident happening on December 11, rather than December 13 as has been identified in the I.C. Form 1 and in his Complaint. Claimant did not mention that he fell on his right shoulder but indicated he experienced a sharp pain in his right shoulder while removing a tarp. He did not mention his left shoulder. He also informed PA McKinlay that “. . . his right shoulder has been sore while working on the farm over the course of the past year, mostly when he uses a shovel or lifts overhead.” Exhibit 3, p. 92. Of note, PA McKinlay observed: “Right shoulder rotator cuff strength with drop arm test and resisted internal rotation +4/5 **in comparison to the contralateral side.**” *Id.* Emphasis added. PA McKinlay suspected a right rotator cuff tear and ordered an MRI.

4. After the MRI revealed a full thickness right shoulder rotator cuff tear, Claimant came under the care of Kenneth E. Newhouse, M.D., a board certified orthopedic surgeon who first saw Claimant on January 30, 2003. Dr. Newhouse diagnosed a right shoulder rotator cuff tear as well as a mild frozen right shoulder. He recommended a course of physical therapy to increase the right shoulder range of motion followed by a right shoulder rotator cuff repair that was accomplished on February 19, 2003.

5. Post-surgery, Dr. Newhouse prescribed physical therapy beginning on February 25, 2003 with an initial evaluation. At that time, it was noted that Claimant's left shoulder was normal. *See*, Exhibit 2, p. 9 and Dr. Newhouse Deposition, p. 31.

6. Claimant first reported left shoulder pain to the physical therapist on July 18, 2003, and to Dr. Newhouse on August 14, 2003.

### **DISCUSSION AND FURTHER FINDINGS**

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See*, Sprague v. Caldwell Transportation, Inc., 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 890 P.2d 732 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). No "magic" words are necessary where a physician plainly and unequivocally conveys his or her conviction that events are causally related. Paulson v. Idaho Forest Industries, Inc., 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). Emphasis added. A physician's oral testimony is not required in every case, but his or her medical records may be utilized to provide "medical testimony." Jones v. Emmett Manor, 134 Idaho 160, 997 P.2d 621 (2000).

#### **Causation:**

7. A finding regarding causation in this matter is clouded by the failure of Claimant to report his left shoulder problems until July of the year following his December accident. He

explained at hearing that the reason he did not report left shoulder problems earlier was because although he felt “discomfort” in his left shoulder at the time of the accident, he thought it would “go away” and he was more concerned with his right shoulder at the time as it hurt worse than the left. It was not until after the surgery on his right shoulder and it began to improve that he began concentrating on his left shoulder. Further, Claimant and his wife testified that Claimant had a tendency to delay seeking medical treatment in general until his condition became unbearable.

8. The first indication of Claimant experiencing left shoulder pain is found in a July 18, 2003, physical therapy note stating that Claimant’s left shoulder soreness was increasing “ . . . likely the result of cont’d overuse as it has compensated for functional deficits in the dominate r[ight] UE.” Exhibit 2, p. 23. Claimant had been to physical therapy over 50 times prior to the July 23<sup>rd</sup> note without complaining of left shoulder problems. It was not until August 14, 2003, that he complained of left shoulder pain to his treating physician, Dr. Newhouse.

9. At Defendants’ request, Claimant saw Richard Wathne, M.D., an orthopedic surgeon in Pocatello whose practice emphasizes knee and shoulder surgery, on January 15, 2004. Claimant informed Dr. Wathne that he injured his right shoulder when he landed on the ground after his fall, not from pulling on the tarp. Claimant further informed Dr. Wathne that he did not initially experience left shoulder pain but did a few months after his fall. Dr. Wathne diagnosed a probable left shoulder rotator cuff tear that would eventually require surgery. Dr. Wathne testified as follows regarding causation:

Q. (By Mr. Bailey): Okay. And I guess my question is, he has asserted he injured his shoulder as a result of this accident on December 13, 2002. And I guess my question is, in terms of the pathology that you think existed in the shoulder at the time you examined him, does this lag time between the date of the alleged accident and the development of the problems that he told you about, does that surprise you?

A. I think it's definitely unusual that if he directly injured his left shoulder at that time and had a rotator cuff tear, which appears to be basically the same size as what he had in his right shoulder and basically had the same pathology in his left shoulder as the right shoulder, that more than likely that was a preexisting condition prior to falling on it. But that's not to say that it could not have been related to his work duties previously, which was a manual labor-type job.

Q. And I believe Dr. Newhouse, I'll represent to you we took his deposition a week ago. And Dr. Newhouse, one of the statements he made in discussing apportionment issues was the attritional aspect of damage to the shoulder over the years.

Is that what you're talking about?

A. Yeah, I would agree with that. I think that there was a component of his right shoulder and his left shoulder of an attritional-type of wear and tear to his activities on the job.

I did not find a specific relationship between his fall and producing the left shoulder pain directly.

Q. And is that mostly based upon the lack of contemporaneous complaints to his doctors?

A. Yes.

Q. Okay. And based upon your findings by way of exam and the x-ray studies, and I guess what was also ultimately uncovered due to the left shoulder MRI, would you have suspected some type of complaints contemporaneous?

A. Right after the fall considering that basically he had the same pathologic findings in the left shoulder as the right shoulder, I would have expected that he would have been more symptomatic in regards to his left shoulder and it not be four or five months later. And it's possible that this just became aggravated in the course of physical therapy with ongoing exercises with both shoulders.

. . .

Q. (By Mr. Lewis): Does - - I guess, let's go back and make one other - does the fact of your - I guess I'm going to call this your read as to the character of the particular patient, does that also come into - in your weighing of whether or not an industrial accident is caused by - excuse me - whether a condition or injury is caused by an industrial accident? In other words, your feeling of whether they're telling you the truth or not?

A. You know, after seeing thousands of patients you have a good way of kind of getting a general gestalt of patients. You know, and I don't think that Mr. Fernandez was, you know, lying per se, you know, intentionally lying. But I just didn't have the indication from the way he described landing on the ground

on his right shoulder, not having – not reporting significant pain for four or five months after the injury, I just found that a little bit inconsistent with being able to causally relate his left shoulder problem that started at that time directly to the injury on December 13.

But like I said before, knowing what his job activities were as a farm laborer, I felt, you know, after examining him, more than likely that was, you know, related to his job activities through an attritional nature. But I was asked to say, was it directly related to the [sic] December 13, and my opinion was, no.

Dr. Wathne Deposition, pp. 9-10, 23-24.

10. Claimant's treating physician, Dr. Newhouse, also expressed an opinion regarding causation:

Q. (By Mr. Lewis): Okay. So I think we have a letter – well, let me ask you this question this way: Have you formulated an opinion, based upon your examination of Mr. Fernandez and then based on your experience as to the causation of what actually caused this triggering event where the rotator cuff was actually torn, or at least the last event that led to the rotator cuff tearing?

A. My opinion with respect to the etiology of the tear is exactly the same as what I just described for the right shoulder in the sense it is an attritional process. In terms of what is the index event, it's difficult to determine. But according to the patient and my best recollection, he did not have pain before the index event in December of 2003 [sic – 2002] and had pain after that.

. . . .

Q. (By Mr. Bailey): Okay. So I gather, trying to read between the lines, here, your opinion on causation is based upon the personal history presented by him or his wife, however it came to you?

A. That's correct.

Q. Okay. And so that's the foundation for your causation opinion?

A. Yes.

. . . .

Q. With this lack of contemporaneous complaints of the left shoulder and with the findings on the MRI of the degenerative conditions in the left shoulder, would you think it's more probable than not this rotator cuff just simply let go sometimes [sic] during the summer of 2003, consistent with his pain complaints creeping up at that point in time?

A. I'd answer the question this way: I would state that I think that, again, for somebody who's labored for 20 or 30 years, that I think that, in my



opinion, the cause of his rotator cuff has been his activities over the course of the last 30 or 40 years or however long he's been working, some of which occurs at his house or where he lives and doing the things that he does off work and some of which – a considerable part of which occurs when he's working 14 hours a day in the spud harvest.

To my way of thinking, the event that causes the camel's back to break, as it were, isn't as important as the attritional process that had gone on over the course of the last 20, 30 years with respect to causation of the tear.

Dr. Newhouse Deposition, pp. 16-17, 36-37.

11. The medical testimony in this case does not lead to the conclusion that Claimant's left shoulder rotator cuff tear was caused by the December 13, 2002, industrial accident. Dr. Wathne opined that it was not; Dr. Newhouse opined that it might have been because he had no other explanation. However, he also testified in his deposition that it was "possible" that Claimant's left shoulder rotator cuff tear occurred with the fall and that it was "possible" that it occurred at the time Claimant began complaining about left shoulder pain in the summer of 2003. Dr. Newhouse's opinion is equivocal. Dr. Newhouse also testified that the "language barrier" was "significant." However, the Defense produced Claimant's supervisor and a co-worker to testify that they never had any problem communicating with Claimant in English and vice versa. Further, the Referee noted at hearing that Claimant had little, if any, difficulty testifying without the aid of the interpreter. Two other factors weigh heavily against the proposition that Claimant tore his left shoulder rotator cuff in the December 2002 accident. One is PA-C McKinlay's office note of December 17, 2002, just a few days after the accident wherein he indicates that Claimant's right shoulder was compared with his left and no mention was made regarding any problem with the left. The second is a February 25, 2003, physical therapy note recording various tests conducted on both of Claimant's shoulders. Dr. Newhouse testified that the results of the testing in no way indicated a torn left shoulder rotator cuff. The Referee also finds significant the fact that Dr. Newhouse never explained the mechanism of how

a fall on Claimant's right shoulder could cause a rotator cuff tear in Claimant's left shoulder even if one is to believe that Claimant experienced left shoulder pain at the time. His explanation that there is no other explanation is insufficient to establish causation. Further, recording of a claimant's history of a fall, without more, does not show the requisite causal connection. Caudle v. Boulder Mountain Village, 91 IWCD 52, p. 4198 at 4201 (1991). In sum, the Referee finds that Claimant has failed to prove his left shoulder rotator cuff tear and resultant treatment was caused by his December 13, 2002, industrial accident.

**Compensable consequences:**

12. Claimant argues that he injured or aggravated his left shoulder in physical therapy for his right shoulder and is entitled to benefits as a compensable consequence of his industrial injury. The only mention of an injury in physical therapy is in Dr. Wathne's deposition wherein he states: "And it's possible that this just became aggravated in the course of physical therapy with doing exercises with both shoulders." Dr. Wathne Deposition, p. 10. Also, "And my opinion is more than likely it got aggravated with physical therapy as he started to rehab the right shoulder, we worked the left shoulder." Dr. Wathne Deposition, p. 27. Dr. Newhouse does not mention any injury or aggravation caused by physical therapy, nor does Claimant. Dr. Wathne's opinion regarding an aggravation in physical therapy is without foundation. Even if Claimant did indeed suffer an aggravation to the extent that he was experiencing increasing left shoulder pain, there is absolutely no evidence that such an aggravation, whenever and however it may have occurred, caused the left shoulder rotator cuff tear for which Claimant seeks benefits.

**Apportionment:**

13. While there is no apparent authority in Idaho Code § 72-406 for the apportionment of anything other than disability benefits, our Supreme Court and the Commission

have judicially interpreted that statute to allow for apportionment of medical and “kindred expenses.” See, Dawson v. Hartwick, 91 Idaho 561, 428 P.2d 480 (1967). Defendants argue that they overpaid benefits for Claimant’s accepted right shoulder injury and they should be credited for that overpayment if the left shoulder is found to be compensable as both physicians involved in this case have opined that 50% of the right shoulder problem was due to pre-existing degenerative conditions. Because the Referee has not found the left shoulder to be compensable, and because Defendants are not seeking reimbursement for their alleged overpayment, it is not necessary to decide that issue.

**Medical and TTD benefits:**

14. Based on the above findings, the issues of medical and TTD benefits are moot.

**CONCLUSIONS OF LAW**

1. Claimant has failed to prove his left shoulder rotator cuff tear was caused by his industrial accident.
2. The remaining issues of apportionment, medical, and TTD benefits are moot.

**RECOMMENDATION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this \_\_8<sup>th</sup>\_\_ day of \_\_November\_\_\_\_\_, 2004.

INDUSTRIAL COMMISSION

\_\_\_\_/s/\_\_\_\_\_  
Michael E. Powers, Referee

ATTEST:

\_\_\_\_/s/\_\_\_\_\_  
Legal Associate

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 16<sup>th</sup> day of November, 2004, a true and correct copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

FRED J LEWIS  
PO BOX 1391  
POCATELLO ID 83204-1391

ERIC S BAILEY  
PO BOX 1007  
BOISE ID 83701

\_\_\_\_/s/\_\_\_\_

ge